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IN THE
Supreme Court of the United States

CHEVY CHASE BANK, F.S.B., *et al.*,

Petitioners,

v.

DAVID WELLS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Maryland Court of Appeals

BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION AND CONSUMER BANKERS ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Where the federal government has occupied the field, can a state court interpret a standard contractual choice-of-law provision to impose otherwise preempted state law on the contracting parties?

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[1] Pursuant to Rule 37.6 of this Court, amici curiae state that no counsel for a party has written this brief in whole or in part and that no person or entity other than the amici curiae, their members or their counsel has made a monetary contribution to the preparation or submission of this brief.

With the written consent of the parties, originals of which have been filed with the Clerk, the American Bankers Association and Consumer Bankers Association hereby respectfully submit this brief as amici curiae to urge that the Petition for Writ of Certiorari in the above-entitled case be granted.

INTEREST OF THE AMICI CURIAE

The American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. Its members are located in each of the fifty states and the District of Columbia and include banks of all types and sizes, including money-center, regional and community banks, national and state chartered banks, commercial banks, savings banks and savings and loan associations, independent and holding company owned banks. ABA members hold approximately 90% of the domestic assets of the industry.

Consumer Bankers Association ("CBA") was founded in 1919 and has as its members most of the nation's largest bank holding companies as well as regional and super community banks that collectively hold two-thirds of the banking industry's assets. CBA members are leaders in consumer financial services including auto finance, home equity lending, credit cards, educational loans, small business services, community development, investments, deposits and delivery.

Both associations frequently appear in litigation, either as a party or as amicus curiae, where the issues raised are of widespread importance to the industry at large or to the consumers of banking products and services. As a matter of policy, both associations have historically

supported the continued existence and strengthening of the dual banking system whereby individual institutions have the choice between chartering and regulation by the government of the United States and chartering and regulation by the state in which the institution is located. The creative tension between the two sets of chartering authorities has been an engine of immense growth in the capacity of the industry to serve the American consumer with an increasing array of products and services.

Critical to the success of the dual banking system is the correct understanding and application of the principles of federal preemption in the banking context. Federal primacy over the activities of federally-chartered institutions prevents individual states from significantly interfering in the initiatives of such institutions that have either the explicit or tacit approval of the federal authorities. States, being naturally jealous of their own prerogatives, tend to expect compliance with their own laws by all entities doing business in the state or with the state's citizens, whether those entities are federally-chartered or state-chartered and without regard for any federal interests extraneous to the state. Here, Maryland has its own disclosure statute setting forth a method by which financial institutions must notify customers of prospective changes in their contracts. The statute was no doubt adopted by the General Assembly for good and valid reasons. The Maryland Court of Appeals seemed determined to advance those public policy reasons, even in the face of its own admission that the state law was preempted, by sanctioning a back-door method of accomplishing that which could not be accomplished directly.

As we show below, the reasoning of the Maryland court, if allowed to stand and if followed elsewhere, can

have immense ramifications for the banking industry at large, well beyond the interests of the immediate parties to this case. We respectfully submit that your amici, as national associations for the industry, may be equipped to assist the Court in gauging the importance of the issues presented here.

STATEMENT OF THE CASE

At the time it entered into a credit card agreement with the Respondents in this case, Chevy Chase Bank, F.S.B. ("Chevy Chase") was headquartered in the State of Maryland. The credit card agreement contained, among other things, three provisions that are relevant to the discussion here. (1) It reserved to Chevy Chase the right to alter the terms of the agreement at any time so long as the change was "in accordance with applicable law." (App. 46a). (2) It recited that the agreement was made in Maryland, and that the governing law would be Title 12, Subtitle 9, of the Commercial Law Article of the Maryland Annotated Code and applicable federal law (App. 47a). (3) It set out the various financial terms and conditions of the contract pertaining to interest rates, late fees, over-limit fees and so forth.

Eight years ago this month, Chevy Chase relocated to Virginia. Concurrent with that move, the bank invoked its right to amend the agreement. It notified its customers, including the respondents, that (1) the agreement was made in Virginia and was subject to and governed by Virginia law and applicable federal law and regulations, and (2) various of the financial terms dealing with finance charges and other fees were changed as well (App. 4a-5a).[2] The

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[2] A third change of which the respondents were notified after the move to Virginia was the addition of a clause calling for

notice sent to customers announcing these changes complied in all respects with the bank's obligations under the federal Truth in Lending Act and the Respondents do not contend otherwise. The Respondents contended, however, that the notice did not comply with the requirements of Maryland law, specifically Title 12, Subtitle 9 of the Commercial Law Article. Finding that law preempted, the Circuit Court for Baltimore City dismissed the complaint (App. 51a-52a), but the Maryland Court of Appeals reversed in the decision that is now subject of the Petition for Writ of certiorari in this case.

ARGUMENT

The Petition for Writ of Certiorari filed in the case has already set forth the argument that the decision of the Maryland Court of Appeals is at odds with this Court's decision in *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141 (1982), and is in conflict with the decisions of other appellate courts as well, including among others *Fantastic Fakes, Inc. v. Pickwick International, Inc.*, 661 F.2d 479 (5th Cir. 1981), *Brown v. Investors Mortgage Corp.*, 121 F.3d 472 (9th Cir. 1997) and *Atkinson v. General Electric Credit Corp.*, 866 F.2d 396 (11th Cir.), *cert. denied,* 493 U.S. 815 (1989). Your amici adopt and defer to those arguments as presented by the Petitioners. No point would be served by our repetition of them.

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resolution of disputes between the parties by mediation and arbitration. That change was also subject to litigation between these parties (*see Wells v. Chevy Chase Bank, F.S.B.*, 363 Md. 232, 768 A. 2d 620 (Md. 2001)) but is not before this Court.

The amici respectfully submit, however, that the Petition should also be granted because of the considerable impact that the decision below could have upon federal-state relations in the area of banking law, a topic already too much litigated, and upon the clarity, predictability and uniformity of rules under which banks and their customers should be able to operate. Unless reviewed and overturned by this Court, the Maryland Court of Appeals' decision is both likely to be utilized by parties (states' attorneys general, consumer activists, class action counsel, etc.) in other states and likely to be relied upon by other states' highest courts to upset and countermand the preemption of federal law established by federal banking regulators with respect to the lending activities of federal charted banking institutions. All of the very largest credit card issuers have "choice of law" provisions in the contracts they have with their customers. There are variations in the phrasing of the provisions[3] but, if the Maryland Court of Appeals is right,

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[3] Exemplars include the following:

a) "This Agreement and your Account will be governed by federal law and the laws of the state of Nevada, whether or not you live in Nevada and whether or not your Account is used outside Nevada. This Agreement is entered into in Nevada and all credit under this Agreement will be extended from Nevada."

b) "This Agreement and your Account and any claim, dispute or controversy arising from or relating to this Agreement or your Account, whether based on contract, tort, fraud or other intentional torts, statute, common law and/or equity, are governed by and construed in accordance with the laws of the State of Georgia

all are susceptible to the interpretation that the choice of law provision incorporates back into the contract assorted

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will be governed by the laws of the state of(without regard to internal principles of conflicts of laws), and applicable federal law. The legality, enforceability and interpretation of this agreement and the amounts contracted for, charged and received under this Agreement will be governed by such laws. This Agreement is entered into between you and us in Georgia. We make decisions about granting credit to you under this agreement from, and accept your payments in, Georgia."

c) "This agreement Delaware and by applicable federal laws."

d) " The terms and enforcement of this Agreement shall be governed by federal law and the law of South Dakota, where we are located."

e) "This Agreement and your Account, and all questions about their legality, enforceability and interpretation, are governed by the laws of the State of Utah (without regard to internal principles of conflicts of law), and by applicable federal law. We are located in Utah, hold your Account in Utah, and entered into this Agreement with you in Utah."

f) "This Agreement is governed by the laws of the United States of America (federal law) and the State of Delaware. Any dispute concerning any item in this Agreement will be resolved by those laws."

and unanticipated state laws that would otherwise be preempted. A bank that today uses the language in footnote 3, for example, that selects Georgia law (including statute law) could hardly intend to bind itself by the provisions of the Georgia Fair Lending Act (Ga. Code Ann. § 7-6A-1 et seq.), a statute that imposes such onerous restrictions and penalties on certain classes of loans that the secondary market briefly refused to purchase any mortgages originated in that State,[4] and a statute that has been pronounced preempted by federal law as to federally-chartered thrift institutions by the Office of Thrift Supervision (OTS Legal Op. P-2003-1 (January 21, 2003)) and as to national banks and their operating subsidiaries by the Comptroller of the Currency (68 Fed. Reg. 46264 (August 5, 2003)). And yet that would be the inevitable interpretation of the boilerplate "choice of law" provision under the reasoning of the Maryland Court of Appeals.

Choice of law provisions are necessary and useful in any contract that involves or may involve transactions across state lines, and particularly in the case of banking contracts. First of all, various provisions of federal banking law incorporate state law, so it is important for the parties to a contract to know and to recite which state it is whose law is applicable to a given transaction. For example, 12 U.S.C. § 85 authorizes national banks to charge "interest at the rate allowed by the laws of the State, Territory, or District where the bank is located." *See also*, 12 U.S.C. § 1463(g). Similarly, 12 U.S.C. § 1831d extends the same authorization to federally-insured state-chartered institutions. National banks are allowed to operate new branches wherever in a State a State bank would be authorized to operate a branch by state statute

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[4] *See* 69 Fed. Reg. 1908, col. 2 (Jan. 13, 2004)

pursuant to 12 U.S.C. § 36(c). The trust powers that may be exercised by national banks are made equivalent to those of State banks in the state in which the national bank is located under 12 U.S.C. § 92a. National banks are likewise bound by the unclaimed property or escheat laws of the States under 12 U.S.C. § 484(b).

Second, even in this case where the Office of Thrift Supervision claims to "occupy the field" of lending regulation and deposit-related regulation for federal savings associations (a claim upheld by this Court in *de la Cuesta*), there remain a variety of state laws, not touching upon those activities, that are applicable even to federally-chartered institutions. These include, among others, contract and commercial law, real property law, homestead laws, tort, and criminal law. 12 C.F.R. § 560.2(c) (2002). Since federal law does not preempt and does not govern in these areas, it is entirely reasonable for a contracting bank to specify what law does govern--and to do so without in any way intending to give up its rights and expectations that federal law will continue to preempt those areas of state law that do touch upon lending and deposit-taking activities.

Since the Petition for Writ of Certiorari was filed in this case, the concerns raised by the reasoning of the Maryland Court of Appeals have become even more important and thus of more pressing need for review by this Court. As indicated above, the Petitioner, Chevy Chase Bank, F.S.B., is subject to regulation by the federal Office of Thrift Supervision, an agency whose organic statute and regulations occupy the field of lending and deposit-taking activities. But far more credit card issuers are not subject to OTS regulation. Rather, they are subject to the jurisdiction of commercial bank regulators, and most of

them to the jurisdiction of the Comptroller of the Currency, the regulator of national banks.

The Comptroller of the Currency has explicitly disclaimed the intention that his regulations (or his organic statute, the National Bank Act, itself) entirely preempts the field of regulating national banks' activities[5]. Nevertheless, like the Office of Thrift Supervision, the Comptroller has recently determined that certain classes of "state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers are not applicable to national banks." (69 Fed. Reg. 1916, col. 2-3 (Jan. 13, 2004)). Included among such laws are state laws pertaining to "[d]isclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit related documents[.]" (*Id.*, to be codified at 12 C.F.R. § 7.4008(d)(2)(viii)).[6] It is a determination and a final rule that clearly applies to the Maryland law in question here--a disclosure law invoked in the context of a credit related document, an amendment to the credit contract.

Thus, now for national banks, issuers of the great bulk of credit cards, as was earlier the case for Chevy Chase and other federally-chartered thrift institutions, the cognizant federal regulatory authority has, for good and valid reasons, pronounced laws like Maryland's

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[5] 69 Fed. Reg. 1911, col. 1 (Jan. 13, 2004).

[6] The Office of Thrift Supervision counterpart to the Comptroller's new regulation is found at 12 C.F.R. § 560.2(b)(9) (2002).

inapplicable. The Maryland Court of Appeals' reasoning effectively defeats the federal regulators' purposes unless the lending institutions either (a) choose to drop "choice of law" provisions from their contracts--something they cannot do as a practical matter or (b) attempt to re-write choice of law provisions to exclude some of the laws of the chosen state--an exercise in futility, since no one can anticipate either future enactments or even all future applications or attempted applications of current law.

Maryland cannot do this consistently with the Supremacy Clause of the Constitution. Yet if the decision below is not reviewed and reversed by this Court, other states may follow suit to the detriment of the banking industry and its consumers. The unpredictability and lack of uniformity of rules applicable to federally chartered institutions' lending activities that would be thereby engendered would be grossly inefficient and to no good end. That is a consideration recognized by this Court for a century:

> [The National Bank Act] has in view the erection of a system extending throughout the country, and independent, so far as the powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose *limitations and restrictions as various and numerous as the states*.

Easton v. Iowa, 188 U.S. 220, 229 (1903) (emphasis added).

CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari, the amici, American Bankers Association and Consumer Bankers Association, respectfully urge that the Petition be granted.

Respectfully submitted,

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